

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>SCOTT MILLIGAN</b>	)	
Claimant	)	
V.	)	
	)	
<b>PUSH UNDERGROUND CONSTRUCTION</b>	)	
Respondent	)	
AND	)	Docket No. 1,075,843
	)	
<b>TRAVELERS PROPERTY CASUALTY</b>	)	
<b>CO. OF AMERICA<sup>1</sup></b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent appealed the January 14, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Mark E. Kolich of Lenexa, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent. Randall W. Schroer of Kansas City, Missouri, appeared for Travelers Property Casualty Co. of America (Travelers). Kendra M. Oakes of Kansas City, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 13, 2016, preliminary hearing and exhibits thereto; the transcript of the January 6, 2016, preliminary hearing; and all pleadings contained in the administrative file.

**ISSUES**

Respondent alleges claimant's October 12, 2015, work injury is not compensable because said injury was contributed to by his use or consumption of alcohol or drugs. After

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<sup>1</sup> Travelers disputes it provided respondent coverage on the date of claimant's accident.

hearing claimant's testimony concerning the drug test and reviewing a drug test document, the ALJ ruled:

The respondent offered the results of a drug test which the court excluded for the following reasons:

1. Lack of proof the test sample was taken by a licensed health care professional.
2. Lack of proof a split sample was made available to the employee within 48 hours of a positive test.

The record failed to prove an intoxication defense.<sup>2</sup>

Respondent asserts the Board has jurisdiction to review this matter and that claimant's gas chromatography-mass spectroscopy (GCMS) drug test results were positive for drugs or alcohol. Therefore, under K.S.A. 2014 Supp. 44-501(b)(1)(C), claimant was conclusively presumed impaired at the time of his work accident.

Claimant asserts the Board lacks jurisdiction to review the ALJ's evidentiary ruling. If the Board has jurisdiction, claimant asks the Board to affirm the preliminary hearing Order.

1. Does the Board have jurisdiction to review the ALJ's finding that claimant's drug test results are not admissible?

2. If the Board has jurisdiction to review the ALJ's ruling on admissibility, did respondent prove claimant's accident was contributed to by the use of drugs or alcohol?

#### **FINDINGS OF FACT**

Claimant alleges a right knee injury while working for respondent on October 12, 2015. On October 13, 2015, claimant was sent by respondent to CareSpot for treatment and was asked to provide a urine sample for a drug test. Claimant testified he was asked to take the drug test by CareSpot, not respondent. Claimant voluntarily provided a urine sample. Respondent asked the ALJ to review a drug test document listing the name of the person from CareSpot who collected the urine sample.

Claimant objected to the drug test document because: (1) the document did not indicate whether the sample was collected or labeled under the supervision of a licensed health care professional, (2) the collection was not done within a reasonable time after the accident and (3) there was no evidence the testing laboratory was approved by the United States Department of Health and Human Services or was licensed by the Department of

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<sup>2</sup> ALJ Order (Jan. 14, 2016) at 2.

Health and Environment. The drug test document was offered into evidence, but was not placed into the record. The ALJ reviewed the document and indicated he would make a ruling on its admissibility.

Claimant testified he recalled that a woman at CareSpot requested he take the drug test, but did not know if she was a nurse or doctor. He testified he had not smoked marijuana in the week to two weeks prior to his accident. Claimant admitted having prior DUIs, but did not recall how many or his most recent. He does not have a valid driver's license.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2014 Supp. 44-501(b) states, in part:

(1)(A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

...

(C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

...

(2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

(3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:

(A) The test sample was collected within a reasonable time following the accident or injury;

(B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;

(E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and

(F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

On an appeal from a preliminary hearing order, the Board can review only allegations that an ALJ exceeded his or her jurisdiction under K.S.A. 2014 Supp. 44-551 and issues listed in K.S.A. 2014 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.<sup>3</sup>

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<sup>3</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

In *Holloway*,<sup>4</sup> a Board Member concluded the Board did not have jurisdiction to review the ALJ's decision to admit drug test results into evidence at a preliminary hearing. The Board Member authoring *Holloway* stated:

Respondent advances the position that the Board lacks jurisdiction of the issue raised by claimant because an evidentiary ruling concerning the admissibility of evidence is not a jurisdictional issue as set forth in K.S.A. 44-534a. The Board has held that on review of a preliminary hearing order, the Board has jurisdiction to consider issues concerning whether a respondent has or has not successfully satisfied its burden to prove an intoxication defense. In *Gutierrez*,<sup>5</sup> the Board held:

The Board has held that the term "certain defenses" applies to issues that go to the compensability of the claim. The intoxication defense contained in K.S.A. 2006 Supp. 44-501(d) makes an otherwise compensable work-related accident noncompensable when the injury was contributed to by an employee's use of certain drugs, including marijuana. Accordingly, the issue of whether claimant was intoxicated and, if so, whether claimant's injury was contributed to by his use of marijuana constitutes a "certain defense" under K.S.A. 44-534a(a)(2). As such, the Board has jurisdiction of . . . that issue at this juncture of the proceedings.

In *Thill*,<sup>6</sup> the Board ruled:

The Appeals Board has previously held that the intoxication defense contained in K.S.A. 1996 Supp. 44-501(d)(2) is the type of defense contemplated by K.S.A. 1996 Supp. 44-534a. See *Lacerte v. Marks Homes, Inc.*, Docket No. 175,893 (May 1996); *Cockerham v. Nichols Fluid Service*, Docket No. 201,867 (Feb. 1996); *Sexton v. Barrett Cement Company*, Docket No. 193,688 (Nov. 1995); *Wolford v. Osman Construction*, Docket No. 196,863 (May 1995); *Stroud v. Val Gottschalk D/B/A Valentine Roofing & Waterproofing, Inc.*, Docket No. 195,244 (March 1995); *Cooper v. Exide Corporation*, Docket No. 184,696 (Jan. 1995). The Board has jurisdiction to hear this appeal from a preliminary hearing order.

However, the Board has not ruled consistently on the issue of whether the Board has jurisdiction, on appeal from a preliminary hearing order, to review an issue regarding the admissibility of the results of post-accident drug testing. In

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<sup>4</sup> *Holloway v. Sterling Drilling Co.*, No. 1,063,474, 2013 WL 5521847 (Kan. WCAB Sept. 19, 2013).

<sup>5</sup> *Gutierrez v. Diebolt*, No. 1,032,056, 2007 WL 4296027 (Kan. WCAB Nov. 30, 2007).

<sup>6</sup> *Thill v. Monfort, Inc.*, No. 214,119, 1997 WL 557534 (Kan. WCAB Aug. 14, 1997).

*Decker*,<sup>7</sup> the Board, under these circumstances, did exercise jurisdiction and ruled on whether the ALJ erred in admitting the results of a post-injury drug test.<sup>8</sup>

The Board has also held that, on appeal from a preliminary hearing order, it has no jurisdiction to review an issue regarding the admissibility of drug testing. In *Lodwick*,<sup>9</sup> it was held:

The issue whether drug testing results should be admitted into evidence at a preliminary hearing is not a jurisdictional issue listed in K.S.A. 44-534a that is subject to review in an appeal of a preliminary hearing order. Moreover, there is no question an administrative law judge has the authority to make evidentiary rulings at a preliminary hearing. Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

In *Hutchinson*,<sup>10</sup> it was ruled:

The ALJ's evidentiary ruling on the admissibility of the drug test results was an interlocutory ruling that was within the ALJ's jurisdiction to decide. . . . The Board is without jurisdiction to decide this issue on an appeal from a preliminary hearing.

In *Hicks*,<sup>11</sup> a Board member found:

As with other evidentiary questions at preliminary hearing, the ALJ is charged with the responsibility of determining whether the evidence proffered has sufficient reliability, relevance and foundation to be considered, knowing that the hearing is summary in nature.

The Board finds an administrative law judge has the authority at a preliminary hearing to determine whether the respondent has met all

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<sup>7</sup> *Decker v. Southwind Drilling, Inc.*, No. 1,064,078, 2013 WL 3368497 (Kan. WCAB Jun. 12, 2013).

<sup>8</sup> See *Jones v. Junction City Wire Harness*, No. 1,059,933, 2013 WL 485708 (Kan. WCAB Jan. 31, 2013).

<sup>9</sup> *Lodwick v. Webster Engineering & Manufacturing Co., Inc.*, No. 1,030,167, 2007 WL 435901 (Jan. 18, 2007).

<sup>10</sup> *Hutchinson v. U.S.D. 259*, Nos. 1,033,518 & 1,033,519, 2010 WL 769931 (Kan. WCAB Feb. 12, 2010).

<sup>11</sup> *Hicks v. Butler Transport, Inc.*, No. 1,026,648, 2006 WL 2328107 (Kan. WCAB Jul. 14, 2006).

the foundation requirements for a chemical test to be admitted into evidence. The Board finds the ALJ did not act arbitrarily or capriciously in her exclusion of the proffered documents and, neither abused her discretion nor acted outside the scope of her jurisdiction. Therefore, the Board concludes it does not have jurisdiction to review the ALJ's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a drug screen result.

The *Garcia*<sup>12</sup> case considered the same issue:

The Board finds the ALJ did not act arbitrarily or capriciously in her admission of the proffered documents and, neither abused her discretion nor acted outside the scope of her jurisdiction. Therefore, the Board concludes it does not have jurisdiction to review the ALJ's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a drug screen result.

An ALJ has the authority and obligation to rule on evidentiary issues, including the admissibility of drug test results. This Board Member finds the Board is without jurisdiction to review the ALJ's evidentiary ruling that claimant's drug test results are inadmissible. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.<sup>13</sup> Accordingly, this matter is dismissed for lack of jurisdiction.

Even if the Board has jurisdiction to review the issue raised by respondent, this Board Member cannot do so because the record is incomplete. While the ALJ prudently reviewed the drug test document, said document was not placed into the record. Consequently, this Board Member has little information concerning the drug test. For example, it is unknown if claimant tested positive for alcohol or drugs, and if so, what drug? The ALJ excluded the drug test results, in part, because claimant was not offered a split sample. Yet, claimant never objected that a split sample was obtained, nor testified concerning a split sample.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>14</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

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<sup>12</sup> *Garcia v. ADM Farmland*, No. 1,007,078, 2003 WL 21962903 (Kan. WCAB Jul. 10, 2003).

<sup>13</sup> See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

<sup>14</sup> K.S.A. 2014 Supp. 44-534a.

by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>15</sup>

**WHEREFORE**, the undersigned Board Member finds that the Board is without jurisdiction to review respondent's application for Board review of the issue of the admissibility of claimant's post-accident drug test results. The application is therefore dismissed for lack of jurisdiction.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2016.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge

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<sup>15</sup> K.S.A. 2014 Supp. 44-555c(j).